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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 738

THE SEVEN UP COMPANY,
Petitioner,

vs.

BLUE NOTE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Diversity Jurisdiction (28 U. S. C. 1332)	5
Lanham Act Jurisdiction (28 U. S. C. 1338, 15 U. S. C. 1121)	10
(a) Statutory Trademark Infringement	10
(b) Statutory Unfair Competition	10
Conclusion	11

TABLE OF CASES.

Ambassador East, Inc. v. Orsatti, Inc., 257 F. 2d 79 (3rd Cir., 1958)	6
American Auto Assoc. v. Spiegel, 205 F. 2d 771 (2nd Cir., 1953)	11
Bitterman v. Louisville and Nashville Railroad Company, 207 U. S. 205 (1907)	9
Beneficial Industrial Loan Corp. v. Kline, 132 F. 2d 520 (8th Cir., 1942)	5
City Messenger of Hollywood v. City Messenger Service, ... F. 2d ....., 116 USPQ 75 (7th Cir., 1958)	11
DuPont Cellophane Co. v. Waxed Products Co., 6 F. Supp. 859 (E. D. N. Y., 1934), modified, 85 F. 2d 75 (2nd Cir., 1936)	10
E. I. duPont de Nemours & Co. v. Sylvania I. Corp., 122 F. 2d 400 (4th Cir., 1941)	10
Glenwood Light and Water Company v. Mutual Light, Heat and Power Company, 239 U. S. 121 (1915)	8
Harvey v. American Coal Co., 50 F. 2d 832 (7th Cir., 1931), cert. denied, 284 U. S. 669	5
Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., 95 F. 2d 711 (10th Cir., 1938)	5

L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F. 2d 649 (3rd Cir., 1954) 11
Lyon v. Quality Courts United, 249 F. 2d 790 (6th Cir., 1957) 11
Maternally Yours v. Your Maternity Shop, 234 F. 2d 538 (2nd Cir., 1956) 11
Mishawaka Mfg. Co. v. Kresge Co., 316 U. S. 203 (1941) 7
Pagliero v. Wallace China Co., 198 F. 2d 339 (9th Cir., 1952) 10
Purcell v. Summers, 126 F. 2d 390 (4th Cir., 1942) 6
Ross-Whitney Corp. v. Smith Kline & French Lab., 207 F. 2d 190 (9th Cir., 1953) 11
Seaboard Finance Company v. Martin, 244 F. 2d 329 (5th Cir., 1957) 6
Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc., 245 F. 2d 453 (7th Cir., 1957) 7, 9
Stauffer v. Exley, 184 F. 2d 962 (9th Cir., 1950) 10
Ury v. Mazer Cigar Mfg. Co., 253 Fed. 551 (8th Cir., 1918) 6
Wisconsin Electric Co. v. Dumore Co., 35 F. 2d 555 (6th Cir., 1929) 6

TREATISES

The Restatement of Torts, Sec. 727, Comment b 8, 10

STATUTES.

Title 15 U. S. C. 1051-1127 ..... 2, 10
Title 15 U. S. C. 1057(b) 2, 10, 16a
Title 15 U. S. C. 1116 ..... 2, 10, 17a
Title 15 U. S. C. 1121 ..... 2, 10, 17a
Title 15 U. S. C. 1126(b) 2, 17a
Title 15 U. S. C. 1126(h) 2, 10, 17a
Title 15 U. S. C. 1126(i) 2, 18a
Title 28 U. S. C. 1332 ..... 2, 3, 5, 16a
Title 28 U. S. C. 1338 ..... 2, 10, 16a

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Seven-Up Company, plaintiff in the district court, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on October 28, 1958.

OPINIONS BELOW.

The opinion of the district court (R. 51-56), printed in Appendix A hereto (p. 1a), is reported in 159 F. Supp. 248. The opinion of the court of appeals, printed in Appendix B hereto (p. 9a), is reported in F. 2d

JURISDICTION.

The judgment of the court of appeals was entered on October 28, 1958 (p. 9a). A petition for rehearing was denied on December 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1) and 15 U. S. C., Section 1122.

QUESTIONS PRESENTED.

(1) Whether, in determining the value of the matter in controversy in a diversity case seeking injunctive relief, the test should be the value of the right violated rather than the damage shown.

(2) Whether, in determining the value of the matter in controversy in a trade identity (deception as to source) case involving passing off, the test should be different from that applied to actions involving deception by the means of ordinary trademark or trade name infringement.

(3) Whether the United States Trademark Act of 1946 (15 U. S. C., Sections 1051-1127) confers federal jurisdiction under 28 U. S. C., Section 1338 (p. 16a), without regard to the amount in controversy, in cases involving passing off of the goods of another on orders comprising the plaintiff's trademark registered under that Act.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1332 and 1338 of the "Judicial Code and Judiciary" (28 U. S. C., Sections 1332 and 1338) and Sections 1057b, 1116, 1121, 1126b, 1126h and 1126i of the United States Trademark Act of 1946 (15 U. S. C., Sections 1057b, 1116, 1121, 1126b, 1126h and 1126i), the pertinent texts of which are printed in Appendix C hereto (p. 16a).

STATEMENT.

This action was brought by petitioner, The Seven-Up Company, to enjoin respondent, Blue Note, Inc., a Chicago night club, from passing off a spurious beverage on orders for petitioner's soft drink, SEVEN-UP (7 UP). The ground alleged for federal jurisdiction was that this is a diversity action, the subject matter of which exceeds the value of $3,000.

Diversity is present. Petitioner's good will represented by its trademark SEVEN-UP far exceeds in value the requisite jurisdictional amount, but the damages, if measurable, caused by respondent's proven instances of passing off are less than $3,000.

On the basis of damages, the district court concluded that the matter in controversy does not exceed the value of $3,000 and dismissed the complaint for want of jurisdiction. It held that the value in controversy in an action involving trade deception by passing off is the amount of actual or threatened damage to petitioner and not the value of the subject matter wrongfully appropriated, the good will represented by petitioner's trademark SEVEN-UP (R. 51-56; pp. 1a-8a). The opinion of the court below (p. 9a), to which the presiding judge wrote a separate concurring opinion (p. 10a), affirmed the judgment of the district court. Rehearing was denied without further opinion.

REASONS FOR GRANTING THE WRIT.

Being utterly fundamental, jurisdictional questions are necessarily of paramount importance unless, by circumstance, they are so peculiarly finite in scope as to involve only a negligible number of controversies. The basic question raised by this action, however, encompasses all diversity actions in which injunctive relief is sought.

The importance of the jurisdictional question of "right violated" *vis-a-vis* "damage" in injunction cases is now multiplied by the recent increase of the federal jurisdictional amount. In many cases where once there was no doubt that by either test the requisite amount was present, now the test applied for determining jurisdictional amount becomes more crucial. The granting of this petition will enable this Court to define that test generally for all federal injunction litigation and specifically for all trade identity actions. This Court has never specifically defined the appropriate test in a trade identity case, but until now the law has been clear and without conflict.

The court below has denied jurisdiction to diversity cases for injunctive relief which uniformly have been considered within the ambit of federal jurisdiction. It applied a test for jurisdiction different from that of all the other circuits—a test in direct conflict with that consistently applied to trade identity cases. Instead of determining the value of the matter in controversy by the value of the good will symbolized by the trademark misappropriated, the court below applied a test of damage.

By granting this petition, this Court will settle a basic question of jurisdiction which directly affects the validity of hundreds of existing federal court injunctions throughout the country. It will resolve the now conflicting law on the most fundamental of questions, jurisdiction, for all diversity cases in which injunctive relief is sought in the federal

courts. If optimum certainty is needed anywhere in the law, it is in jurisdictional questions such as presented here, which may be raised at any point in the course of litigation and which may result in otherwise needless waste of time and expense by both the courts and litigants.

Diversity Jurisdiction (28 U. S. C. 1332).

Until now, the test for determining jurisdictional amount in trade identity cases has been the value of the good will sought to be protected—not the amount of damage. The Court of Appeals for the Tenth Circuit, in *Indian Territory Oil & Gas Co.* v. *Indian Territory Illuminating Oil Co.*, 95 F. 2d 711 (1938), considered this test and held, at page 713:

> "The test, in determining the amount of controversy in a case of this kind presenting a continuing wrong to an established business growing out of unfair trade practices, is not the immediate pecuniary damages arising from the wrongful acts. It is the value of the business or the right to be protected; and business reputation or good will is an intangible asset to be taken into consideration in ascertaining the extent and value of the business or right."

The Court of Appeals for the Eighth Circuit relied upon the *Indian Territory* case and quoted the above in sustaining jurisdiction on the same ground in *Beneficial Industrial Loan Corp.* v. *Kline*, 132 F. 2d 520, 525 (1942). In reaching its decision, the court also relied upon and quoted (p. 25) the following from *Harvey* v. *American Coal Co.*, 50 F. 2d 832, 834 (1931), in which the Court of Appeals for the Seventh Circuit had held:

> "It is the good will—the right to the exclusive use of the name—which is endangered, and the bare statement of the facts conclusively indicates a value many times larger than the jurisdictional amount."

In *Ury* v. *Hazer Cigar Mfg. Co.*, 253 Fed. 551 (8th Cir., 1918), the court sustained jurisdiction in a trade identity unfair competition action by holding (p. 552):

> "It is a familiar rule that the test is the value of the right to be protected against a continuing violation, not the amount of loss or damage actually caused by the trespass to date."

To the same effect are:

Wisconsin Electric Co. v. *Dumore Co.*, 35 F. 2d 555 (6th Cir., 1929):

> "We think jurisdiction depends, not alone upon the pecuniary damage resulting from the acts complained of, but also upon the value of the rights which plaintiff seeks to have protected."

Purcell v. *Summers*, 126 F. 2d 390, 394 (4th Cir., 1942):

> "It is well settled that the measure of jurisdiction in a suit for injunction is the value to plaintiff of the right which he seeks to protect."

Seaboard Finance Company v. *Martin*, 244 F. 2d 329, 331 (5th Cir., 1957):

> "Jurisdiction is to be tested by the value of the right sought to be protected against interference. McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181, 56 S. Ct. 780, 80 L. Ed. 1135. In a suit to restrain infringement of a trade name in Louisiana, the jurisdictional amount is the value to the plaintiff of its claimed right to prevent the use of such name in that State."

The most recent trade identity case, until now, involving the question of jurisdictional amount is *Ambassador East, Inc.* v. *Orsatti, Inc.*, 257 F. 2d 79 (3rd Cir., 1958). There, the plaintiff, like petitioner here, sought to enjoin the defendant from appropriating the benefits of the plaintiff's reputation and good will symbolized by its well-known trade

name "Pump Room". The defendant, before the trial court, successfully urged the "formulation" announced in *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 245 F. 2d 453, 455 (7th Cir. 1957), cert. denied 355 U. S. 911, that the court lacked jurisdiction since there was no actual or threatened damage in the amount of $3,000 (155 F. Supp. 937). The court of appeals, however, reversed and, in defining "the right in terms of good will" (257 F. 2d, at p. 81), sustained jurisdiction despite the absence of damage.

The present decision of the court below discusses that of the Third Circuit in *Ambassador East, Inc. v. Orsatti, Inc.* but does not reconcile it (p. 12a, 13a). The *Ambassador East* case, the present case, and each of those cited above was a simple deception as to source, unfair competition action in which the plaintiff sought injunctive relief against a continuing trespass of its good will. In each the defendant was accused only of trading upon the plaintiff's reputation and good will by deceiving customers into the belief that the goods or services of one were those of the other. In all but the present, the test applied for jurisdictional amount was the value of the subject matter purloined or converted by the defendant to its own purposes—the value of the good will symbolized by the mark or name exploited. Only in the present case has a wholly different test been employed—namely, damages.

As in each of the above cases, what respondent has appropriated is the "commercial magnetism" (*Mishawaka Mfg. Co.* v. *Kresge Co.*, 316 U. S. 203, 205 (1941), built up at great effort and expense by petitioner and totally symbolized by its trademark. In so misrepresenting, respondent wrongly takes unto itself and employs as it will petitioner's immensely valuable asset—that which engenders the continuing purchase of its product by millions. The value of that "commercial magnetism" or good will

which petitioner seeks to protect is the value of the matter in controversy in this, as in every other, trade identity action.

If the court below actually considered that, for jurisdictional purposes, there is some material difference between actions to enjoin outright passing off and actions to enjoin the other more sophisticated forms of deception of source such as label trademark infringement, it does not appear in its opinion. No such difference has been adverted to in previous years by the multitude of courts which have considered these cases. No such difference has ever been noted by the scholars who have written on this subject. In fact, The Restatement of Torts, § 727, Comment b, specifically defines passing off as a form of trademark infringement.

The deceptive exploitation by respondent differs from that of the defendants in the above cases only in that it is perpetrated *orally* rather than *visually*. If this be a distinction, it is without a difference. It should not suffice as a basis for a wholly different test for federal jurisdiction. If the "value of the good will" or "value of the right to be protected" test has been fallacious these many decades, then it should be disavowed. If valid, it should be applied in this action.

This Court has not yet rendered a decision defining the value in controversy in trade identity cases, but until now, there has been no conflict to resolve. This Court, however, has decided analogous injunction cases in which it tested the jurisdictional amount by the value of the right sought to be protected—not by the amount of damage.

In *Glenwood Light and Water Company* v. *Mutual Light, Heat and Power Company*, 239 U. S. 121 (1915), jurisdiction was sustained on the ground that the amount or value in controversy is determined by the value of the right to

conduct one's business free from wrongful interference. At page 125, this Court analogized:

> "We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, viz., that the jurisdictional amount is to be tested by the value of the object to be gained by complainant."
>
> . . . . . .
>
> "The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction."

To the same effect is *Bitterman v. Louisville and Nashville Railroad Company*, 207 U. S. 205 (1907), which, like the *Glenwood* case, has been repeatedly followed by the aforementioned courts of appeal in defining the value of the matter in controversy in trade-identity cases in terms of the value of the right to be protected—the right to prevent others from using one's name or trademark or appropriating the good will symbolized thereby.

The court below relied upon its previously rendered price maintenance, "fair trade" decision, *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 245 F. 2d 453 (1957), cert. denied 355 U. S. 837, in which it divided the litigating world for jurisdictional purposes into two classes, "A" and "B". To come within "Class A" one must show that the alleged *injury or damage* caused or threatened by a defendant exceeds $3,000. To come within "Class B" one must show that the alleged acts, if not prevented, will *completely destroy* a right exceeding $3,000 in value. Judge Hastings, in his concurring opinion, admitted that in applying the *Seagram* case's formulation "there is some conflict between the circuits in their approach to the jurisdictional question" (R. 12a).

In following its own "formulation", the court below has supplanted the familiar rule of this Court and all the other circuits in diversity cases seeking injunctive relief. It is contra to this Court's holdings in analogous cases. It is in direct conflict with every other circuit which has expressly considered the test for determining the jurisdictional amount in trade identity cases.

Lanham Act Jurisdiction (28 U. S. C. 1338, 15 U. S. C. 1121).

a. Statutory Trademark Infringement.

Federal jurisdiction also exists herein under the Lanham Trademark Act of 1946 (15 U. S. C. 1051-1127) without regard to the amount in controversy or to diversity (15 U. S. C. 1121; p. 17a). Petitioner's trademark SEVEN-UP is registered and its registrations are, by statute, petitioner's *prima facie* evidence of its exclusive right to use the mark in commerce (15 U. S. C. 1057b; p. 16a). By statute, petitioner is entitled to bring its action in the federal court to enjoin infringement of its registered trademark (15 U. S. C. 1116; p. 17a); and respondent's passing off constitutes trademark infringement. The Restatement of Torts, § 727, Comment b; *Du Pont Cellophane Co.* v. *Waxed Products Co.*, 6 F. Supp. 859 (E. D. N. Y., 1934), modified, 85 F. 2d 75 (2nd Cir., 1936); *E. I. DuPont de Nemours & Co.* v. *Sylvania I. Corp.*, 122 F. 2d 400 (4th Cir., 1941).

b. Statutory Unfair Competition.

In addition to technical trademark infringement, the United States Trademark Act of 1946 (15 U. S. C. 1126h; p. 17a) confers federal jurisdiction in actions involving claims for unfair competition. The Court of Appeals for the Ninth Circuit has consistently so construed the Act. *Stauffer* v. *Exley*, 184 F. 2d 962 (1950); *Pagliero*

v. *Wallace China Co.*, 198 F. 2d 339 (1952); *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 207 F. 2d 190 (1953). The court below, however, rejected the Ninth Circuit's "Stauffer Doctrine", as did the courts in *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 214 F. 2d 649, 652, 654 (3rd Cir., 1954); *American Auto Assoc.* v. *Spiegel*, 205 F. 2d 771, 774 (2nd Cir., 1953), cert. denied, 346 U. S. 887; and *Maternally Yours* v. *Your Maternity Shop*, 243 F. 2d 538, 540, footnote 1, 546 (2nd Cir., 1956). See also: *City Messenger of Hollywood* v. *City Bonded Messenger Service*, 254 F. 2d 531 (1958), cert. denied, ___ U. S. ___, ___, 3 L. Ed. 2d 66; *Lyon* v. *Quality Courts United*, 249 F. 2d 790, 796 (6th Cir., 1957).

Whether the "Stauffer Doctrine" or the restricted interpretation of the court below respecting the unfair competition sections of the Lanham Act are correct remains to be resolved by this Court. The conflict has already given rise to a number of petitions for a writ of certiorari. Until resolved, it undoubtedly will continue to occasion uncertainty and further petitioning.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

(Memorandum Opinion of the United States District Court.)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.
57-C-208.
February 11, 1958.

Memorandum.

The plaintiff, The Seven-Up Company, owns the registered trade-mark for the beverage "Seven-Up." The defendant, Blue-Note, Inc., operates a restaurant and place of entertainment at 3-7 N. Clark Street, Chicago. This action was brought for damages and injunctive relief against the defendant's alleged practice of passing off as "Seven-Up," to customers requesting that drink, a beverage other than the plaintiff's product.

The plaintiff has moved for a preliminary injunction restraining the averred passing-off practices of the defendant during the pendency of this cause. The plaintiff contends that the acts of the Blue Note constitute unfair competition and threaten continuing and irreparable damage to the plaintiff's good will.

The principal ground upon which the defendant opposes the plaintiff's motion for a preliminary injunction is that the federal court has no jurisdiction over this cause. The action is brought as a diversity case under the provisions of 28 U. S. C. § 1332, and the defendant argues that the jurisdictional amount required by that section has not been established. The defendant points out that while the com-

plaint asserts that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs, the only averments in support of this statement are those alleging that the value of the good will of the plaintiff is greatly in excess of the required jurisdictional amount. The defendant contends, on the basis of *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 245 F. 2d 453 (7 Cir. 1957), cert. denied, 355 U. S. 837 (1957), that the value of the plaintiff's good will is not the measure properly to be employed in determining the existence of the necessary amount in controversy; rather, it is argued, the plaintiff is not properly before the federal court until it has established that the damage allegedly sustained or threatened by the conduct of the defendant exceeds the sum required to confer jurisdiction upon the court.

The defendant's position must be sustained. In the *Seagram* case, *supra*, the Court of Appeals for the Seventh Circuit held that in an action seeking injunctive relief against violation by the defendant of the plaintiff's fair-trade prices the measure to be used in determining the existence of the jurisdictional amount is the extent of the injury to good will caused or threatened by the defendant's actions, and not the value of the good will sought to be protected in the suit. The court reasoned that the extent of the injury was the proper measure inasmuch as the action was predicated upon a theory of damages, rather than upon a theory of total destruction. It states that:

> "* * * when the $3,000 requisite for jurisdiction is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.
>
> "In one class (which we shall call class A), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have, or will, injure or damage a right for which plaintiff seeks pro-

tection. In such a case, if plaintiff shows that the alleged *injury or damage* caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

"In the other class of diversity cases (which we shall call class B), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction." (245 F. 2d at 455.)

The instant action is one which falls within the "class A" category discussed in the *Seagram* case. The complaint asserts that the defendant's alleged acts of passing off other beverages for that of the plaintiff have damaged, and threaten further to damage, the plaintiff's good will; it is not claimed that the defendant's actions will cause the total destruction of this asset of the plaintiff. It was stated in the *Seagram* case: "Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business. The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case." (245 F. 2d at 458.) The plaintiff can establish its required jurisdictional facts only by showing "that the alleged injury or damage caused or threatened by defendant * * * amounts to at least $3,000."

The plaintiff advances two lines of argument seeking to show that the court has jurisdiction over this cause. First, it contests the applicability of the *Seagram* holding to the present action, and second, it contends there are adequate federal grounds for jurisdiction under the Lanham Trade-Mark Act, entirely apart from diversity of citizenship.

I.

The plaintiff makes several arguments contesting the principle that under the *Seagram* case it must show that its present or prospective damages from the defendant's conduct amounts to over $3,000.

(1) First, the plaintiff relies upon several authorities to support the position that the test of jurisdictional amount which is to be applied in this case is the value of the plaintiff's good will. Among these authorities are two Supreme Court cases, *Glenwood Light and Water Co.* v. *Mutual Light, Heat and Power Co.*, 239 U. S. 121 (1915), and *Bitterman* v. *Louisville and Nashville R. R.*, 207 U. S. 205 (1907). These decisions, however, do not sustain the plaintiff's contention. The *Glenwood Light* case is entirely consistent with *Seagram* decision and with the Supreme Court cases discussed therein; the same can be said with respect to the actual holding of the *Bitterman* decision. The latter opinion does contain language which tends to support the plaintiff, but to the extent that it may stand for the view that the value of a business is the jurisdictional yardstick in an action for injury to the business, the case must be regarded as overruled by later Supreme Court decisions. See *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936); *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269 (1936).

The plaintiff also relies upon a recent decision of the Court of Appeals for the Seventh Circuit, *Snap-On Tools Corp.* v. *Winkenweder & Ladd, Inc.*: No. 11991, 7th Cir., Dec. 10, 1957. It is argued that this case is authority for holding in the instant action that the total value of the good will of "Seven-Up" is the proper jurisdictional measure. The *Snap-On* case was a suit for unfair competition based upon trade-mark and trade-name infringement, and the court held that the action was a "class B" suit, as that class was described in the *Seagram* opinion.

The *Snap-On* case is not a precedent for holding that the instant suit constitutes a "class B" action. Although the court did not elaborate its reasons for finding that a "class B" situation was there involved, it seems reasonable to assume that the finding was based upon the fact that the action was one for trademark and trade-name infringement. Thus, the right for which the plaintiff was seeking protection was the right to exclusive use of its name. See *Harvey* v. *American Coal Co.*, 50 F. 2d 832 (7 Cir. 1931). The actions of the defendant threatened destruction, not damage, to this right.

The present suit seeks redress against alleged unfair competition by the defendant; however, this fact alone does not create a "class B" case. See *KVOS, Inc.* v. *Associated Press*, *supra*, an unfair competition suit, where the yardstick was damage. Here, the plaintiff is suing for relief from the damage to its good will caused or threatened by the defendant's alleged passing-off practices. None of the allegations of the complaint establishes that any property or right of the plaintiff is threatened with destruction, as opposed to damage.

The remaining cases cited by the plaintiff are Court of Appeals decisions which are not controlling to the extent to which they may be inconsistent with the *Seagram* case.

(2) Next, the plaintiff seeks to distinguish the *Seagram* decision on the ground that it involved merely the statutory right of the plaintiff to enforce its stipulated fair trade prices and did not concern alleged unfair competition perpetrated by the defendant through deceptive trading upon the good will of the plaintiff. It is further argued that the conduct of the defendant in the *Seagram* case did not result in a loss of sales by the plaintiff, whereas in the instant case the plaintiff suffers both a present loss each time the defendant passes off another beverage as "Seven-Up" and a prospective loss resulting from the customer's

mistaken belief that the quality of the plaintiff's product has deteriorated.

The distinctions drawn by the plaintiff are not sufficient to take the present cause out of the rule of the *Seagram* case. Although that action, unlike the present one, was based upon the Illinois Fair Trade Act rather than upon a theory of passing off, each plaintiff sued for an injury to the good will of its business, and each claimed that the defendant's conduct would cause or had resulted in, a curtailment of sales. (See *Seagram* case, 245 F. 2d at 454.) Moreover, the distinction drawn by the *Seagram* decision between the two classes of diversity actions was not concerned with the specific nature of the conduct of the defendant which caused injury to the plaintiff; rather it was concerned with whether or not that conduct allegedly threatened damage to the plaintiff's property or rights, on the one hand, or complete destruction thereof, on the other hand. In the present case, the plaintiff asserts an injury to its good will, and therefore the case is within that class which requires a showing of the extent of the injury in order to establish the jurisdictional amount.

(3) Third, the plaintiff seeks to show that if the *Seagram* case is controlling, the present action is within "class B" which requires for the establishment of the jurisdictional amount only that the plaintiff show that the right for which protection is sought has a value exceeding $3,000. In this respect, the plaintiff asserts that its good will is threatened with complete destruction insofar as those customers are concerned whose business allegedly will be lost as the result of the defendant's conduct. Such destruction of the plaintiff's good will, however, is not the type which places the action within "class B" as described in the *Seagram* opinion. Loss of customers as the result of the acts of the defendant constitutes damage, only, to the plaintiff's good will. As stated in the *Seagram* case, "Defendants'

acts did not prevent plaintiff from using its good will in the conduct of its business." (245 F. 2d at 458.)

(4) Next, the plaintiff argues that if the instant case does fall within "class A" of the *Seagram* decision, the injury to the plaintiff's good will has been shown to exceed the sum of $3,000. Such injury, it is claimed, "must necessarily exceed $3,000 in the future, if, in fact, it has not already done so." (Pl.'s Reply Brief, p. 7.)

This contention can not support a finding of jurisdictional amount. The *Seagram* decision stated, with respect to a similar argument:

> "It is improper, in the absence of evidence of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount be substantial, to surmise that the amount of the loss is $3,000 or more. * * *" (245 F. 2d at 458.)

The plaintiff has also submitted the Affidavit of Robert E. Joyce, President of the Chicago Seven-Up Bottling Company, the Chicago bottler for the plaintiff. In that affidavit, Mr. Joyce states that:

> "The continued passing off, upon orders for the beverage '7 Up,' of another beverage, not the genuine beverage '7 Up,' by defendant Blue Note, Inc. will result in substantial and irrevocable damage to The Seven-Up Company, caused by actual loss of sales, loss of customers, and by damage to the plaintiff's good will represented by its trademark '7 Up,' in an amount exceeding $3,000, exclusive of interest and costs."

It can not be held on the strength of this affidavit alone that the damage threatened to the plaintiff exceeds the sum of $3,000. The plaintiff has the burden of proving that it is properly in the federal court. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936). The statement of the affiant that the damage to the plaintiff's busi-

ness exceeds the jurisdictional requirement is a mere conclusion. The *Seagram* case states that before jurisdiction can be held to exist, there must be "*evidence* that the monetary value of the damage or injury to plaintiff's good will, sustained or threatened by defendants' acts, exceeds $3,000." (245 F. 2d at 458.) (Emphasis supplied.)

II.

The plaintiff also seeks to avoid the effect of the *Seagram* case by asserting that jurisdiction over the present action does not rest solely upon diversity of citizenship. The plaintiff contends that the federal court has original jurisdiction over actions for unfair competition under the Lanham Trade-Mark Act, 15 U. S. C. § 1126, irrespective of the presence of a jurisdictional amount.

Although this contention has gained some acceptance in the federal courts, a number of cases have rejected the argument. The Court of Appeals for the Seventh Circuit has recently ruled on this question, deciding adversely to the plaintiff. *City Messenger of Hollywood, Inc.* v. *City Bonded Messenger Service, Inc.*, No. 12046, 7th Cir., Jan. 9, 1958.

The plaintiff has failed to sustain its burden of establishing the existence of federal jurisdiction. Therefore, its motion for a temporary injunction must be denied, and the complaint is dismissed for want of jurisdiction.

An order has been entered in conformance with this memorandum.

JULIUS J. HOFFMAN,
Judge.

APPENDIX B.

(Opinion of the United States Court of Appeals for the Seventh Circuit.)

IN THE
UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 12297.

OCTOBER 28, 1958.

Before, HASTINGS and KNOCH, *Circuit Judges*, and WHAM, *District Judge*.

KNOCH, *Circuit Judge*. Plaintiff, owner of the registered trademark for a beverage "Seven-Up," sought damages and injunctive relief against alleged passing off of a beverage, other than plaintiff's product, to persons requesting plaintiff's product at defendant's restaurant and place of entertainment.

In support of its challenged assertion that the jurisdictional requirement had been met, plaintiff contended that the value of its good will,—the right sought to be protected—, constituted the measure of the amount in controversy.

In a carefully reasoned memorandum, the District Court came to the conclusion that plaintiff had failed to sustain its burden of establishing the existence of federal jurisdiction. The District Court relied on *Seagram-Distillers Corp.* v. *New Cut Rate Liquors*, 1957, 245 F. 2d 453, wherein this Court held that the amount in controversy was measured by the extent of the injury caused or threatened,

unless the action were predicated on a theory of total destruction. This was consistent with the holding in *Snap-On Tools Corp. v. Winkenweder & Ladd, Inc.*, 1957, 250 F. 2d 154, mistakenly cited by plaintiff in support of its attempt to distinguish *Seagram* as dealing with unfair competition in retail sales price in contrast to plaintiff's charge of unfair competition by passing off.

However, as noted by the District Court, *KVOS, Inc., v. Associated Press*, 1936, 299 U. S. 269, 57 S. Ct. 197, 81 L. Ed. 183; and *McNutt v. General Motors Acceptance Corp.*, 1936, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135; cited in the *Seagram* case, clearly indicate the reasoning followed by this Court.

Plaintiff argues that this case may fall within the same class of cases as that represented by *Snap-On*, or that jurisdiction may exist solely by reason of the trademark infringement charged. Neither argument is supported by plaintiff's pleadings or evidence. In holding adversely to plaintiff's assertion of federal jurisdiction by virtue of the Lanham Act, the District Court relied on our ruling in *City Messenger of Hollywood v. City Bonded Mess. Serv.*, 1958, 254 F. 2d 531, cert. den. U. S.

JUDGMENT AFFIRMED.

HASTINGS, *Circuit Judge*, concurring. Appellant's well-known trade-mark, "Seven-Up," is registered both with the United States Patent Office and the Secretary of State of the State of Illinois. Appellee owns and operates a restaurant and place of entertainment in Chicago, Illinois. This suit was brought by appellant as a diversity action seeking damages for, and injunctive relief from, appellee's alleged unfair practice of passing off a beverage other than "Seven-Up" to customers ordering that drink at appellee's place of business. Appellee, in its answer de-

nied, among other things, the formal allegation of the complaint that the amount in controversy exceeded the $3000 requisite for diversity jurisdiction and moved to dismiss the suit. Appellant then moved for a preliminary injunction, pending the litigation, and, after both parties had submitted briefs and affidavits, the trial court ruled that appellant had failed to sustain its burden of establishing the existence of federal jurisdiction, denied the motion for a preliminary injunction and dismissed the complaint.

It is urged on this appeal that the trial court erred in determining the value of the amount in controversy by considering only the actual monetary damage resulting from the loss of sales (past and prospective) occasioned by appellee's alleged illegal practices. Appellant contends, in effect, that, by this action, it seeks primarily to protect its good will as symbolized by its registered trade-mark and that, consequently, the value of its good will, so symbolized, and vastly in excess of $3000 in value, is the actual amount in controversy.

The trial court dismissed the complaint in this case in reliance upon this court's decision in *Seagram-Distillers Corp.* v. *New Cut Rate Liquors, Inc.*, 7 Cir., 245 F. 2d 433 (1957); cert. den., 355 U. S. 837. That case involved a diversity suit to enjoin alleged violations of fair trade contracts entered into in accordance with the Illinois Fair Trade Act. This court held, with one judge dissenting, that, in a diversity suit, in which injunctive relief is sought for the protection of a property right, *which property right is threatened with injury but not with destruction*, the amount in controversy is, not the entire value of the property, but the actual extent of damages, past and prospective, to that property. The court based its decision on *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936) and *KVOS, Inc.* v. *Associated Press*,

299 U. S. 269 (1936) and, in line with the reasoning of those cases, held that where a defendant in such a suit properly challenges the allegations of jurisdictional facts the burden is on the plaintiff to sustain those allegations by competent proof. The district court found that the instant case involved, at best, a *threatened injury* to plaintiff's good will and held that there was a complete failure of proof that the extent of damages, past or threatened, totaled the requisite $3000.

Appellant contends that it is a generally accepted rule that, in an action for unfair competition, the amount in controversy is the value of the trade-mark or good will sought to be protected. See *Ambassador East, Inc.* v. *Orsatti*, 3 Cir., 257 F. 2d 79 (1958); *Admiral Corp.* v. *Penco, Inc.*, 2 Cir., 203 F. 2d 517, 520 (1953). A closely related proposition is that in a suit to enjoin injury to property (such as nuisance or continuing trespass), the amount in controversy is the value of the property. *Glenwood Light and Water Co.* v. *Mutual Light, Heat and Power Co.*, 239 U. S. 121 (1915); *Kelly, Inc.* v. *Lehigh Nav. Coal Co., Inc.*, 3 Cir., 151 F. 2d 743, 747 (1945).

The authorities cited by appellant are not inconsistent with the *Seagram* case's formulation of a distinction between two classes of diversity action of this type, although, admittedly, there is some conflict between the circuits in their approach to the jurisdictional question.[1]

1. The courts in at least two circuits have accepted jurisdiction in fair trade cases on the basis that the injury, if any, is to the good will of the plaintiffs. *Sunbeam Corp.* v. *Richardson*, D. C. W. D. Ky., 144 F. Supp. 583 (1956) (reversed by the Court of Appeals for the Sixth Circuit on other than jurisdictional ground, 243 F. 2d 501 (1957)); *Morris Corp.* v. *Hess Brothers, Inc.*, 3 Cir., 243 F. 2d 274 (1957). The jurisdictional question was not raised in *Morris Corp.* nor was it raised in *General Electric Co.* v. *Hess Brothers, Inc.*, D. C. E. D. Penn., 155 F. Supp. 57 (1957) recently decided in that circuit. The question was properly raised in the *Sunbeam Corp.* case, *supra*, but not successfully. The court, on appeal in that case, did not consider the question.

Our court has since reaffirmed its holding in *Seagram* in the case of *Calvert Distillers Co.* v. *Wish*, 7 Cir., ... F. 2d .... (1958).

The Court of Appeals for the Third Circuit recently reaffirmed its holding that, in a suit to enjoin trade name infringement, the jurisdictional amount is to be based on the value of the property right (the good will of plaintiff) being injured. *Ambassador East, Inc.* v. *Orsatti, Inc.*, 3 Cir., 257 F. 2d 79 (1958). That court, in so doing, reversed the district court which had relied on the *Seagram* case of this circuit, and two other cases, *Food Fair Stores, Inc.* v. *Food Fair, Inc.*, 1 Cir., 177 F. 2d 177 (1949) and *Pure Oil Co.* v. *Puritan Oil Co., Inc.*, D. C. D. Conn., 39 F. Supp. 69 (1941),[2] as supplying the correct method to be used in calculating the jurisdictional amount. It held that the plaintiff, owner of a hotel in Chicago, could bring suit in the federal courts to enjoin a violation of its trade name by the owner of a hotel in Philadelphia.

The *Pure Oil* case also involved a trade name infringement. The defendant in that case owned a single service station as opposed to the plaintiff's nationwide operation. The suit was for the purpose of enjoining defendant's use of the name "Pure" in connection with its oil and gas products. Chief Judge Clark of the Second Circuit, sitting as a district judge, held that, where the operations of a violating user of a trade name did not tend to divert customers, the unjustified appropriation of a trademark or name, while a wrong, did not carry with it definite damage unless the appropriator's service was of a low quality or the wrongful use destroyed what would otherwise be the uniqueness of associations of the mark. The value of the good will could be the amount in controversy *only* if the entire value of the good will was theatened by the alleged infringement. It was pointed out that the statements in the various authorities to the effect that the value of the good will is the amount in controversy

2. Reversed, 2 Cir., 127 F. 2d 6 (1942), on grounds not material to the instant case.

signified only that damages were not to be limited to those accrued but should include those *reasonably to be expected to occur in the future.*

The Court of Appeals for the First Circuit, following the approach of Chief Judge Clark outlined above, held that the requirement of jurisdictional amount was adequately met in *Food Fair Stores, Inc.* v. *Food Fair, Inc., supra.* The defendant in that case also owned one local store, not in competition with those of plaintiff. The court held that in arriving at the amount in controversy it could and would consider the probability of injury to plaintiff's plans to open a store in the locality of defendant's store, and on this basis distinguished *Pure Oil* on the facts.

In the instant case the alleged passing off by appellee of a beverage other than appellant's "Seven-Up" to customers ordering that drink is admittedly wrongful. However, there is nothing in the affidavits of appellant to indicate that it results in a loss of sales to it or in any way inflicts injury on its trade-mark or good will. It would be manifestly arbitrary to measure the amount in controversy by reference to the value of appellant's good will irrespective of the extent of injury to that property. Lacking proof of injury to its good will for which it would be entitled to damages, appellant cannot maintain this action in the federal courts as a diversity action.

Although the only ground of jurisdiction alleged in the complaint is that of diversity of citizenship, appellant contends that jurisdiction also exists either because of the basic trade-mark infringement provisions of the Lanham Act (15 U. S. C. A. §§ 1057(b), 1115(a) and 1116) or under the unfair competition section of that Act (15 U. S. C. A. § 1126).

With regard to the trade-mark infringement, it was not alleged nor was any evidence offered to show that the

"passing off" by appellee had any substantial effect on interstate commerce. The requirement that the infringing use be in interstate commerce is clearly not satisfied in this case. 15 U. S. C. A. § 114; *Admiral Corp.* v. *Penco, Inc.*, 2 Cir., 203 F. 2d 517 (1953).

The contention that jurisdiction is vested in the federal courts on a naked claim for unfair competition was, as pointed out by the majority opinion, adequately answered in the negative in our opinion in *City Messenger of Hollywood* v. *City Bonded Messenger Service*, 7 Cir., 254 F. 2d 531 (1958), cert. den. U. S.

For the foregoing reasons I would affirm the judgment of the district court.

APPENDIX C.

STATUTES.

"Judicial Code and Judiciary"

28 U. S. C., Section 1332.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

28 U. S. C., Section 1338.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights, and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws.

THE UNITED STATES TRADEMARK ACT OF 1946.
(The Lanham Act.)

15 U. S. C., Section 1057(b)—

A certificate of registration of a mark upon the principal register provided by this Act shall be prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein.

Title 15 U. S. C., Section 1116—

The several courts vested with jurisdiction of civil actions arising under this Act shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent Office.

Title 15 U. S. C., Section 1121—

The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeal of the United States and the United States Court of Appeals for the District of Columbia shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

Title 15 U. S. C., Section 1126(b)—

Persons who are nationals of, domiciled in, or have a bona fide and effective business or commercial establishment in any foreign country, which is a party to (1) the International Convention for the Protection of Industry Property, signed at Paris on March 20, 1883; or (2) the General Inter-American Convention for Trade-Mark and Commercial Protection signed at Washington on February 20, 1929; or (3) any other convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition to which the United States is a party, shall be entitled to the benefits and subject to the provisions of this Act to the extent and under the conditions essential to give effect to any such conventions and treaties so long as the United States shall continue to be a party thereto, except as provided in the following paragraphs of this section.

Title 15 U. S. C., Section 1126(h)—

Any person designated in paragraph (b) of this section as entitled to the benefits and subject to the provisions of this Act shall be entitled to effective pro-

tection against unfair competition, and the remedies provided herein for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.

Title 15 U. S. C.; Section 1126(i)—

Citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in paragraph (b) hereof.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 738

THE SEVEN-UP COMPANY,

Petitioner,

vs.

BLUE NOTE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT.

Respondent operates a place of entertainment for devotees of jazz music, and incidentally serves beverages to patrons. It does not carry petitioner's "7-Up", but does carry a beverage known as "Upper Ten", the total sales of which amount to less than $500 in an entire year (R. 50). Employees are carefully instructed to tell patrons who may order 7-Up that respondent does not serve it but does have Upper Ten (R. 44-46). The few alleged instances of so-called "passing off" of Upper Ten for 7-Up were entirely due to the occasional failure of employees to heed

instructions, and in the aggregate obviously involved an insignificant dollar amount (petitioner omitting any proof of the dollar amount involved). Accordingly petitioner's assertions that respondent is "passing off a spurious beverage" and is engaged in "deceptive exploitation" are hardly appropriate to describe the actual facts; rather they are calculated to color a *de minimis* situation with an air of importance.

QUESTIONS PRESENTED.

(1) In a suit for injunction, where the complaint alleges damage but makes no claim that defendant's conduct threatens destruction of plaintiff's good will, and no attempt whatsoever is made to prove the character or amount of supposed damage, present or prospective, is the value of the matter in controversy to be measured by the entire value of the good will?

(2) Where there is no allegation in the complaint that the case arises under the Lanham Act; no allegation that defendant's acts affect commerce; no attempt to prove any effect upon commerce; and the facts make it plain that commerce is not affected—does the District Court have jurisdiction of the cause under the Lanham Act?

REASONS FOR NOT GRANTING THE WRIT.

1.

The question as to the value of the matter in controversy was settled by this Court many years ago. *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 181, 80 L. Ed. 1135 (1936); *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278-9, 81 L. Ed. 183 (1936).

The value of the good will could be the amount in controversy only if the entire value of the good will were in jeopardy. The complaint (R. 3-6) makes no such claim, and no proof of such a nature was offered or attempted; from the facts it is evident that such a claim would be absurd. Indeed, no proof whatsoever was made of the character or amount of damage to the petitioner's good will, or, indeed, that there was any damage at all.

As is pointed out in the concurring opinion below of Judge Hastings (petition, pp. 13a-14a) the statements in the various authorities to the effect that the value of the good will is the amount in controversy signify only that the damages are not to be limited to those accrued, but should include those reasonably to be expected to occur in the future. Since, in the case at bar, there was no attempt whatsoever to prove the amount of damage involved, either accrued or prospective, the record is devoid of any basis for the proposition that jurisdictional amount is to be measured by the entire value of the good will.

Such being the status of the pleadings and proof, the court below rightly applied this Court's holdings in the *McNutt* case, 298 U. S. 178, 181, and in the *KVOS* case, 299 U. S. 269, 278-9.

The asserted "conflict" between the circuits does not exist; the supposed conflicting holdings are predicated upon a variety of different factual situations, different pleadings and different proof. There is no federal jurisdictional question involved which has not long since been settled by this Court.

2.

The only ground of jurisdiction alleged in the complaint is that of diversity of citizenship (R. 3-6). Not only does the complaint fail to assert jurisdiction under the Lanham Act but it is devoid of any allegation that respondent is engaged in commerce or that its acts affect commerce. Nor was any evidence offered on this subject. It is evident from the record that respondent's total soft drink sales are insignificant in amount and are wholly intrastate, being confined to the premises of a single night club in Chicago.

Petitioner cannot assert jurisdiction under the Lanham Act when it has (1) failed to plead such jurisdiction, and (2) offered no evidence that commerce is involved or affected. Cyclopedia of Federal Procedure, Third Ed., Volume 4, § 14.148; *Gully* v. *First National Bank*, 299 U. S. 109, 113, 81 L. Ed. 70; *Stauffer* v. *Exley*, 194 F. (2d) 962, 967 (1950).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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